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No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM CALLAHAN,
Petitioner

V.

DAVID YOUNG,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the placement of a defendant in a dock at a state trial constitutes such a denial of fundamental fairness as to justify the grant of habeas corpus relief by a federal court in the absence of demonstrable actual prejudice?

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PETITION FOR WRIT OF CERTIORARI
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PARTIES

The parties in this case are William Callahan, Superintendent of the Massachusetts Correctional Institute at Norfolk and the respondent/defendant David Young.

OPINIONS BELOW

The opinion of the Court below Young v. Callahan, 700 F.2d 32 (1st Cir. Feb. 16, 1983) appears as Appendix A. The opinion of the United States District Court for the District of Massachusetts, Young v. Callahan, No. 81-2499-C (July 30, 1982) appears as Appendix B. The opinion of the Massachusetts Supreme Judicial Court, Commonwealth v. Young, Mass. Adv. Sh. (1981) 280, 416 N.E.2d 944, appears as Appendix C.

JURISDICTION

The judgment of the Court below was entered on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment " ... nor shall any state deprive any person of life,

liberty, or property without due process of law ..."

STATEMENT OF THE CASE

The respondent was indicted on March 18, 1977 on three charges, assault by means of a deadly weapon of Anthony Grant, and two counts of murder in the first degree of James Walker and Lenwood Walker. Trial began on January 9, 1978. On January 20, 1978, the jury found the petitioner guilty of assault and battery but failed to reach a verdict on the murder charges. The trial judge declared a mistrial on the murder charges. On the assault and battery charge the defendant was sentenced to 5-10 years at M.C.I. Walpole. The Massachusetts Appeals Court affirmed the conviction, Commonwealth v. Young, 6 Mass. App. 953, 383 N.E. 2d 515 (1978); The

Massachusetts Supreme Judicial Court denied further appellate review, Commonwealth v. Young, Mass. Adv. Sh. (1979) 256.

On February 5, 1979, petitioner was retried on the murder charges. On February 15, 1979, the jury found the petitioner guilty of second degree murder on both counts. The petitioner was sentenced to two consecutive life sentences. On November 3, 1980 the Massachusetts Superior Court Appellate Division reduced the petitioner's sentence to two concurrent life sentences. On February 3, 1981, the Massachusetts Supreme Judicial Court affirmed the petitioner's murder convictions. Commonwealth v. Young, Mass. Adv. Sh. (1981) 280, 416 N.E.2d 944 (1981). (Appendix C).

Respondent filed a petition for federal habeas corpus relief on January 26, 1982. After a hearing, the Federal District Court for the District of Massachusetts on July 30, 1982 denied the application for a writ of habeas corpus and dismissed the petition, Young v. Callahan, 81-2499 (Caffrey, C.J.) (July 30, 1982). (Appendix B). On September 7, 1982, the First Circuit Court of Appeals granted respondent's Motion for a Certificate of Probable cause and on February 16, 1983 reversed the judgment of the District Court, ordering that the writ of habeas corpus should issue unless the Commonwealth arranged for a new trial within ninety days. Young v. Callahan, 700 F.2d (1st Cir. 1983) (Appendix A). The First Circuit stayed the execution of the mandate until May 9, 1983.

STATEMENT OF THE FACTS

The underlying facts of respondent's two murder convictions are presented in the opinion of the Supreme Judicial Court. Commonwealth v. Young, Mass. Adv. Sh. (1981) at 281-286, 416 N.E.2d at 946-948. (Appendix C). This Petition for Certiorari from the grant of federal habeas corpus relief involves only the placement of respondent in the courtroom dock. Prior to trial defense counsel presented a written motion to allow the defendant to sit at counsel table rather than in the dock. (Appendix D). A supporting affidavit was filed with the motion. (Appendix E). The trial judge denied the motion. (Appendix F). Respondent sat in the dock throughout the trial.

REASON FOR GRANTING THE WRIT

In this case, United States Court of Appeals for the First Circuit applied a constitutional analysis in direct conflict with controlling decisions of this court. Rules of the United States Supreme Court, 17.1(c). The holding of the First Circuit, that the then customary Massachusetts practice of seating criminal defendants in the dock[1/] during trial violated the respondent's constitutional right to due process and a fair trial, directly conflicts with decisions of this Court concerning the scope of federal habeas corpus review.

1/ The courtroom dock used in Massachusetts is a wooden enclosure usually four or five feet square. The dock is open at the top, the upper torso of the seated person is visible. Commonwealth v. Moore, 379 Mass. 106, 108, 393 N.E.2d 904, 907 (1979).

Smith v. Phillips, 455 U.S. 209, 221 (1982); Donnolly v. DeChristoforo, 416 U.S. 637, 643 (1974); Spencer v. Texas, 385 U.S. 554, 563-65 (1967); Snyder v. Massachusetts, 291 U.S. 97, 105 (1933). Fundamentally, the First Circuit Court of Appeals erred by substituting its own perception of fair criminal procedure for that of the Commonwealth of Massachusetts, rather than applying the stringent constitutional standards developed by this court for federal habeas corpus review of state court convictions.

Federal habeas corpus relief from a state court conviction is proper only where the conviction was obtained in violation of a specific provision of the constitution. Smith v. Phillips, 455 U.S. 209, 221 (1982); Cupp. v. Naughten, 414 U.S. 141, 146 (1973). A violation

of the constitutional right to due process and a fair trial must involve a failure to observe fundamental fairness. Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). Justice Cardozo's analysis from Snyder v. Massachusetts, 291 U.S. 97 is fully applicable to this case.

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (citations ommitted) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.

Id. at 105. A demonstration of fundamental unfairness is not easily made.

> . . .[A]part from trials conducted in violation of express constitutional mandates, a

> constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in Moore v. Dempsey, [261 U.S. 86] that the proceeding is more a spectacle (Rideau v. Louisiana, 373 U.S. 723, 726) or trial by ordeal (Brown v. Mississippi; 297 U.S. 278, 285) than a disciplined contest.

United States v. Augenblick, 393 U.S. 348, 356 (1969).

The burden of demonstrating that the trial was a spectacle which offends deeply rooted principles of justice is born by the petitioner. Adams v. United States, 317 U.S. 269, 281 (1942). The petitioner seeking relief in federal court with a claim that his criminal trial in the state courts violated due process must show the fundamental unfairness as a demonstrable reality.

> . . .The burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.

Id. at 281. Finally the federal court must be vigilant in avoiding the temptation to sit as a court of appellate review of state criminal convictions. This court has cautioned that the inclination of a federal court to impose its own policies on a state court, albeit well-intended, risks inspiring contempt for the criminal law.

> The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic form through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged semper ubique et ab omnibus (Otis v. Parker, 187 U.S. 606, 609, 47 L.ed 323, 327, 23 S.Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt - that discredit will even touch the great immunities assured

> by the Fourteenth Amendment - if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

Snyder v. Massachusetts, 291 U.S. 97, 124.

In this case the First Circuit Court of Appeals misconstrued the issue presented and thereby failed to apply the proper constitutional analysis. The First Circuit then compounded its error by presenting an analysis based on factors which were constitutionally irrelevant and which rested on speculation. Finally, the First Circuit's treatment of the case classically illustrates the distinction between the broad supervisory powers of a state court and the limited constitutional review of federal habeas corpus.

The First Circuit Court of Appeals framed the issue:

> Here we must decide the question of whether the dock without any particular justification can today pass constitutional muster.

Young v. Callahan, 700 F.2d at 33. (Appendix A at 2). This presentation of the issue shifts the burden to the Commonwealth to justify the use of the dock. The proper question for federal habeas corpus review is whether the petitioner can demonstrate actual demonstrable prejudice rendering his trial fundamentally unfair. Smith v. Phillips, 455 U.S. 209, 221 (1982); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974); Townsend v. Sain, 372 U.S. 293, 311-12 (1963); Adams v. United States, 317 U.S. 269, 281 (1942); Snyder v. Massachusetts, 291 U.S. 97, 105, 124 (1933).

The First Circuit answered the question it posed in the negative. For the First Circuit the use of the dock without any particular justification cannot pass constitutional muster. Young v. Callahan, 700 F.2d at 32, (Appendix A at 2). The First Circuit then supported its conclusion with a discussion of several factors which are totally inappropriate to the proper constitutional analysis.

The court determined that the use of the dock: 1. contravened the ABA standards; 2. was not in accord with contemporary custom; 3. might erode the presumption of innocence; and 4. might interfere with effective communication between lawyer and client. Id. at 35-36. (Appendix A at 11-19).

The First Circuit emphasized that the use of the dock contravened the standards of the American Bar Association. ABA standards relating to trial by jury, commentary to §4.1(a) at 92 (1968), see Young v. Callahan, 700 F.2d at 35-36, (Appendix A at 8-9). The Court also found significance in the limited use of the dock in other jurisdictions.[2/] Id. at 36 (Appendix A at 9). While both these observations may be true, they are constitutionally irrelevant. The constitutional issue is not whether the ABA or other states have determined that as a matter of policy

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2/ While the courtroom dock is not generally used in the United States, placement of a defendant in the dock remains standard English practice. Halsbury's, Laws of England, Butterworth's, London (1976) Vol. II paragraph 230.

the use of the dock should be restricted,[3/] but whether the petitioner can show actual prejudice from his placement in the dock leading to a fundamentally unfair trial.

In its third and fourth factors,the court began with a proper constitutional basis, the presumption of innocence and right to effective assistance of

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3/ Massachusetts has also restricted the use of the dock to those situations where it would be the least restrictive security measure. In Commonwealth v. Moore, 379 Mass. 106, 393 N.E.2d 904 (1979), the Supreme Judicial Court reviewed the historical development of the practice, surveyed the practice in other jurisdictions and determined, in its supervisory capacity that "for the future" [the trial judge should allow the defendant's request to sit at counsel table unless there are security reasons for the use of the dock; the security reasons must then be stated on the record. Id. at 111, 393 N.E.2d at 908. The Court concluded that the use of the dock would be proper where security was required and the dock was the least restrictive measure available. Id.]

counsel, but quickly abandoned constitutional analysis in favor of speculation. The First Circuit speculated that the use of the dock might erode the presumption of innocence and might interfere with effective communication between lawyer and counsel. Young v. Callahan, 700 F.2d at 35-37, (Appendix A at 8-10). Nothing in the record supports the Court's fears. The Commonwealth of Massachusetts does not accept the First Circuit's speculation as to the presumption of innocence. Seating the defendant in the dock is not truly analogous to requiring the defendant to dress in identifiable prison clothing. Estelle v. Williams, 425 U.S. 501 reh. denied, 426 U.S. 954 (1976); Walker v. Butterworth, 457 F.Supp. 1233, 1239 (D. Mass. 1978) rev'd 599 F.2d 1074 (1st Cir. 1979).

A criminal trial is a formal

process. The judge, jury, and court officers are also required to sit in designated areas. Bumpus v. Gunter, 635 F.2d 907, 914 (1st Cir. 1980). Seating the defendant in the dock is only marginally different from requiring the defendant to sit at counsel table or in the first bench. Walker, 457 F.Supp. at 1239. United States v. Turkette, 656 F.2d 5, 9-10 (1st Cir. 1981), rev'd on other grounds, 101 S.Ct. 2524.

The Commonwealth also rejects the First Circuit's speculation as to effective communication with counsel.[4/]

4/ Cf. Commonwealth v. Boyd, 246 Pa. 529 (1914). In Boyd the court determined that the defendant should be allowed to sit with counsel, notwithstanding the general policy of placing the accused in the dock to ensure an orderly trial. The Pennsylvania Court, however, found the placement of the defendant in the dock harmless observing that it was "impossible for a mind not disturbed by excessive zeal to see in what respect the defendant was prejudiced." Id. at 534.

The grant of federal habeas corpus relief based upon such speculative possibilities is in direct conflict to the standard set by this Court. Adams, 317 U.S. at 281. The petitioner must establish essential unfairness "not as a matter of speculation but as demonstrable reality". Id. at 281; Townsend, 372 U.S. at 311-12. The reality is that petitioner's state court trial was constitutionally proper.

The decision of the First Circuit Court of Appeals is finally an attempt to exercise supervisory powers over the criminal trial procedures of the Commonwealth. Massachusetts had a longstanding procedure that it was a matter of discretion for the trial judge whether the defendant sat in the dock or at counsel table, and the Supreme Judicial Court consistantly upheld the

trial judge's seating of the defendant in the dock. Commonwealth v. Walker, 370 Mass. 548, 573-74, 350 N.E.2d 678 cert. denied 429 U.S. 943 (1976); Commonwealth v. MacDonald (No. 2), 368 Mass. 403, 408-09, 333 N.E.2d 194 (1975); Commonwealth v. Bumpus, 362 Mass. 672, 680, 290 N.E.2d 167 (1972) judgment vacated and remanded on other grounds, 411 U.S. 945 (1973), aff'd on rehearing 365 Mass. 66 (1974); Commonwealth v. Jones, 362 Mass. 497, 500-01, 287 N.E.2d 599 (1972); Commonwealth v. Labbe, 6 Mass. App. Ct. 73, 81, 373 N.E.2d 227 (1978); Commonwealth v. Magnasco, 4 Mass. App. Ct. 144, 148, 343 N.E.2d 444 (1976). As noted above, the Massachusetts Supreme Judicial Court has reviewed the practice and under its supervisory powers has prospectively changed the procedure. This was an appropriate excercise of

supervisory powers, not implicating the federal constitution.

That petitioner was tried under the old procedure does not "offend some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." Snyder, 291 U.S. at 105. The Court of Appeals for the First Circuit completely misapplied the stringent constitutional standard for a due process violation in holding that the placement of the respondent in the courtroom dock violated his constitutional right to due process.

CONCLUSION

The Commonwealth of Massachusetts requests that this Court grant the petition for certiorari to correct the

improper use of federal habeas corpus review by the United States Court of Appeals for the First Circuit.

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 82-1722

DAVID YOUNG, JR.,

Petitioner, Appellant,

v.

WILLIAM CALLAHAN,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Andrew A. Caffrey, U.S. District Judge]

Before

Coffin, Chief Judge,

Aldrich and Breyer, Circuit Judges.

Robert L. Sheketoff, with whom Kimberly Homan, Norman S. Zalkind, and Zalkind, Zalkind & Sheketoff were on brief, for appellant.

Michael B. Roitman, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Stephen R. Delinsky, Chief, Criminal Bureau, and Barbara A.H. Smith, Chief, Criminal Appellate Division, were on brief, for appellee.

February 16, 1983

COFFIN, Chief Judge. Appellant David Young appeals the dismissal by the district court of his petition for habeas corpus. Of three grounds urged below as warranting habeas relief, only one is pressed on appeal: appellant contends that his Fourteenth Amendment right to due process was violated when, over objection and without inquiry into security needs, he was confined at trial to the prisoner's dock.[1] In earlier cases we have either found resolution

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1/ The Massachusetts prisoner's dock or box has been described thusly:

> "The dock is a box approximately four feet square and four feet high. It is open at the top so that the defendant's head and shoulders can be seen when he or she is seated. The dock is placed typically at the center of the bar enclosure which separates the spectator's section from that portion of the courtroom reserved for trial principals. The dock is usually fifteen to twenty feet behind counsel table, and is cometimes on a raised platform." Walker v. Butterworth, 457 F.Supp. 1233 (D. Mass. 1978).

unnecessary or that ample justification was present. Here we must decide the question whether the dock without any particular justification can today pass constitutional muster. We conclude that it cannot.

I. Relevant Facts and Procedural History

In January of 1979, appellant was tried in Massachusetts Superior Court on one count of assault and battery with a dangerous weapon and two counts of murder. The jury returned a guilty verdict on the assault and battery indictment but was unable to reach a verdict on the two murder indictments. In a new trial in February of 1979, appellant was found guilty of second degree murder on both counts.[2/]

2/ Appellant was sentenced to two successive life sentences. On November
(footnote continued)

Those convictions were affirmed by the Massachusetts Supreme Judicial Court in Commonwealth v. Young, Mass. Adv. Sh. (1981) 280, 416 N.E.2d 944 (1981).

Prior to appellant's second trial, counsel moved that he be allowed to sit at counsel table rather than in the prisoner's dock on the grounds that "forcing him to sit in the prisoner's dock would deprive him of his constitutional rights to a fair trial, to the presumption of innocence, to access to counsel, non-suggestive eyewitness identifications, and due process of law." That motion was accompanied by an affidavit from appellant's trial counsel averring,

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(footnote continued)

3, 1980, the Appellate Division of the Suffolk County Superior Court Department reduced the petitioner's sentence to two concurrent life sentences.

based on his own observations and those of correctional officers during appellant's two years of incarceration and on appellant's conduct at the first trial, that "allowing [appellant] to sit at counsel table will not present any hazards to the orderly judicial process or to the security of its personnel", and that the trial of the case would involve a substantial amount of testimony concerning acts and conduct of the appellant over a several day period and would thus "require consultation with the defendant." Massachusetts law at the time of appellant's trial placed "it ... within the judge's sound discretion whether to grant a defendant's request to sit at counsel table or elsewhere", Commonwealth v. Moore, 379 Mass. 106 (1979). In this case the trial court denied appellant's motion without allowing counsel to be

heard, in the following colloquy:

"Counsel: I have a motion, your Honor, for the defendant to sit at counsel table. It's a recent one. I had one before and I have a recent one.

The Court: That is all right. That is denied.

Counsel: Denied you said, your Honor?

The Court: Yes.

Counsel: May I be heard?

The Court: Look. We do it routinely. At some time the Supreme Court may tell us different. I know the arguments, pros and cons, having heard them. Until the Supreme Court tells me no we are going to follow --

Counsel: I take my exception. And I also just mention for the record so I will be protected later on because I have gotten an extremely favorable opinion on this from Justice Caffrey on the Walker

case, and I just wanted to make it clear on the record that I consider this a Constitutional question."

II. Prior Case Law

In Walker v.Butterworth, 457 F.Supp. 1233, 1239 (D. Mass. (1978), referred to by counsel in the colloquy above, the court, while finding that "the prisoner's dock in an anachronism in a modern trial which could have been abandoned years ago", concluded that it "is not unconstitutional per se" and that, in that case, it had "neither diluted [petitioner's] presumption of innocence nor denied him a fair and impartial trial." On appeal, finding other grounds which compelled us to grant appellant's petition, we did not reach the question of whether that appellant's confinement to the prisoner's dock was harmful error.

We noted, however, that, like the compelled attire in prison garb held unconstitutional in Estelle v. Williams, 425 U.S. 501 (1976), confinement of the accused to a prisoner's dock may erode the jury's presumption of the accused's innocence.

> "The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumptin of innocence that every person is to enjoy." Walker v. Butterworth, 599 F.2d 1074, 1080 (1979).

Discounting the state interests attributed to use of a prisoner's dock -"identification of the accused person to the jury: minimizing the danger of harm to the public court, and jury; and encouraging maintenance of courtroom

order " -- as achievable in less prejudicial ways, two members of the panel commented by way of dictum:

> "The right of a fair trial is simply too delicate and valuable to be impeded by an anachronistic practice. Because confinement in the prisoner dock is unnecessary to accomplish any important state interest, and may well dilute the presumption of innocence, the Massachusetts prisoner dock must be considered, as a general matter, to be an unconstitutional practice." Id. at 1081.

Noting our commentary in Walker v. Butterworth, but reasoning that "the dock has served and may continue to serve a valid function in those cases where some form of restraint is necessary to prevent escape or to protect others in the court room", the Supreme Judicial Court announced a new rule[3/] in Commonwealth v. Moore,

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3/ While announcing a new rule of procedure for the Massachusetts courts, the Supreme Judicial Court did not address the constitutionality of the use of the prisoner's dock.

379 Mass. 106, 111 (1979):

> "For the future, we think that a judge confronted with a request that the defendant be permitted to sit at counsel table should not deny the request unless he follows the 'more circumspect procedure' we have prescribed for unusual security measures. See, Commonwealth v. Brown, 364 Nass, 471, 478-80 (1973). In particular, the reasons for the denial should be stated on the record. But where inquiry reveals that some security measures are necessary, and that the dock is the least restrictive measure available, we think its use is proper."

Finding no error or, if error, no prejudice in defendant's confinement to the dock, the court noted that "the defendant did not sharply raise a constitutional objection", that "the [trial] judge was concerned with security", and that "the judge gave timely and forceful instructions to the jury to draw no inference from the fact that the defendant was in the dock,

explaining that it was only a matter of custom." Id. at 111.

In Bumpus v. Gunter, 635 F.2d 907 (1980), we once again reviewed the claim of a habeas corpus petitioner that confinement to the prisoner's dock violated his constitutional right to a fair trial. Because the trial judge had stated "specific and supported security reasons" for the use of the dock, we found no constitutional violation:

> "Even assuming without deciding that there is a constitutional right in ordinary circumstances not to be required, over objection, to sit in such an enclosure, the security considerations existing in the present trial sufficiently justified the requirement." Id. at 914-15.

We further expressed the opinion that "[t]he conserns over the use of the dock expressed by this court in Walker v. Butterworth would appear to be satisfied by the policy announced in Commonwealth v. Moore", and speculated, with some

lack of prescience, that "in the unlikely event the issue of constitutionality ever again arises in a particular case, it will have to be resolved in light of all the facts in that case, not in terms of a per se rule." Id. at 914, 914 n.2 (citation omitted).

III. The Use of the Prisoner's Dock in this Case

Unlike in Bumpus or in Moore, there is no evidence here that the trial court was concerned over security. Defense counsel's affidavit, making reference to appellant's behavior during two years of incarceration and at his first trial, alleged that "allowing [appellant] to sit at counsel table will not present any hazards to the orderly judicial process or to the security of its personnel." The trial court made no

further inquiry into the matter and nothing in the record contradicts counsel's affidavit. Unlike the defendant in Moore, appellant here made a clear constitutional objection after having raised the constitutional issue in a pre-trial motion.

In once again evaluating for constitutional error the confinement of an accused to the prisoner's box,[4/]

4/ The district court denied appellant's habeas corpus petition on the basis that the rule announced in Commonwealth v. Moore should not be applied retrospectively. Appellant argues that the retroactivity of a new rule is not at issue because the prisoner's dock has been unconstitutional since Estelle v. Williams, 425 U.S. 501 (1976); and, alternatively, that our decision in Walker v. Butterworth announced a constitutional rule that should be applied retrospectively. We agree with appellee, however, that neither we nor the Supreme Judicial Court have thus far held that confinement of the accused to the prisoner's dock during trial constitutes constitutional error.

we reiterate, see, Walker v. Butterworth, supra, 599 F.2d at 1080, that such confinement, like appearance in prison attire, is a "constant reminder of the accused's condition" which "may affect a juror's judgment", eroding the presumption of innocence which the accused is due. Estelle v. Williams, 425 U.S. 501, 504-05 (1976). In finding unconstitutional the compelled appearance in prison garb of the accused, the Court in Estelle noted that the American Bar Association's Standards for Criminal Justice disapproved the practice. Id. at 504. Those standards read as follows with respect to the custody and restraint of defendants and witnesses:

> "(a) During trial the defendant should be seated where he can effectively consult with his counsel and can see and hear the proceedings.

> (b) An incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict.
>
> (c) Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he should enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge should instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt." ABA Project on Standards for Criminal Justice, Trial by Jury §4.1, pp. 91092 (App. Draft 1968) [hereinafter ABA Standards].

See also, ABA Standards for Criminal Justice §15-3.1 (1980) ("custody and restraint of defendants and witnesses") (substantially unchanged except to reflect the holding in Estelle -- "the trial judge should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner,

unless specifically waived by the defendant").

We note that in the discussion of these Standards, already a decade and a half old, there were exceedingly few jurisdictions in which the dock survived.[5/] We suspect that there are even fewer today.[6/]

5/ Commentary on §4.1(a) indicated that "[a]pparently separation of incarcerated defendants from their counsel by placing them in a prisoner's dock or by other means still occurs on occasion." The most recent case cited by that commentary involving the use of a prisoner's dock or box was State v. Kupis, 37 Del. 27. 129 A. 640 (1935). No more recent cases are cited in the 1980 update of the Standards. See ABA Standards for Criminal Justice §15-3.1 (1980) (commentary on §15-3.1 (a)). We understand that while incarcerated prisoners may be placed in the dock during arraignment proceedings, it is no longer used in Delaware during the course of a trial.

6/ Our own research reveals only occasional contemporary reference to a prisoner's dock or box in a handful of jurisdictions -- see, e.g., State v. Smith, 285 S.E.2d 800 (N.C. 1982) (no (footnote continued)

This evidence from contemporary custom is not without some constitutional significance.

Confinement in a prisoner's dock, if less so than appearance in prison attire, is nonetheless a "brand of incarceration" which is inconsistent with the presumption of innocence. See ABA Standards, commentary on §4.1(b). Such confinement also implicates both of the other fair trial concerns embodies in the ABA Standards.

(footnote continued)

error in prospective jurors seeing defendants in prisoner's box -- area inside 3' x 8' railing seating 3 "customarily used by those in custody awaiting trial"); State v. Adams, 333 A.2d 304, 132 N.J. Super. 256 (1975) (defendant identified by eventual witness while awaiting arraignment in prisoner's dock); State v. Carmody, 291 A.2d 610, 112 N.H. 179 (1972) (same) -- and no indication in any jurisdiction that incarcerated defendants are routinely confined to a prisoner's dock or box during the course of a jury trial.

Even if the court makes allowance for consultation with the confined defendant, access to counsel and thus the right to effective assistance to counsel is inevitably burdened by defendant's confinement to a prisoner's dock. See People v. Zammora, 152 P.2d 180, 214-16 (1944) (Cal. Dist. Ct. App.) (denial of defendant's opportunity to sit at counsel table, or consult with counsel during course of trial except when counsel left counsel table and went over to where defendants were seated, violated due process). Here, defense counsel's affidavit in support of appellant's pre-trial motion to sit at counsel table specifically averred that because there would be extensive testimony concerning appellant's conduct over a period of several days, consultation with defendant during the

course of testimony was necessary to his conduct of appellant's defense.

The only significant state interest in the continued use of the prisoner's dock is as a minimum security measure.

> "Ordinarily, a criminal defendant should be permitted to sit at counsel table. But the dock has served and may continue to serve a valid function in those cases where some form of restraint is necessary to prevent escape or to protect others in the court room. Although the restraint imposed is minor, it has sometimes proved a sufficient obstacle so that court officers could reach the defendant in time to prevent escape or harm to others. Where some form of security is essential, the dock seems far superior to surrounding the defendant with security personnel." Commonwealth v. Moore, supra, 379 Mass. at 110; see also, Bumpus v. Gunter, 635 F.2d at 914. But Cf. Walker v. Butterworth, supra, at 1080-81 (evaluating state interests).

The prisoner's dock, like other physical restraints, should thus be employed only when "the trial judge has found such restraint reasonably necessary to maintain order" and when cured by an

instruction to the "jurors that such restraint is not to be considered in assessing the proof and determining guilt." ABA Standards §4.1(c). The trial judge in this case made no findings that indicated restraint was necessary for security and gave no curative instructions to the jury.

We hold that under all the circumstances of this case -- particularly in the light of appellant's previously decorous behavior during incarceration and a prior trial, as well as the prospect of a trial involving much testimony concerning conduct of appellant over a substantial period -it was constitutional error for the trial court, without any finding that restraint was necessary, over appellant's constitutional objection, to deny appellant's motion to allow him to

sit at counsel table rather than in the prisoner's dock. Nor can we say that such error was harmless beyond a reasonable doubt. See Estelle v. Williams, supra, 425 U.S. at 506-08; Chapman v. California, 386 U.S. 18, 24 (1967). The first jury was unable to agree upon a verdict, and the second jury, after deliberating for a day and a half, returned second degree murder verdicts despite the fact that, based on the prosecutor's theory of the case, the murders for which appellant was tried could only have been the result of cold-blooded planning and premeditation. As argued persuasively by counsel on appeal,

> "Any suggestion that [appellant] was a dangerous person, implanted in the minds of the jurors through observation of [appellant] confined in the dock day after day, may have tipped the scales of justice .... [A]ny implication that [appellant] was the type of person whom it was

> necessary to segregate from jurors, spectators, court personnel, and even his own counsel ... cannot fail to impact upon juror deliberation."

Appellant may have been additionally prejudiced by the burden which placement in the prisoner's dock put upon effective consultation with counsel during the course of the trial.

Our holding is a narrow one. We do not announce per se rule. We do find that in all the circumstances of this case appellant's confinement to the prisoner's dock unconstitutionally impaired his right to a fair trial.

Reversed and remanded with instructiosn that a writ of habeas corpus shall issue unless the Commonwealth makes arrangements for a new trial within ninety days.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID YOUNG, JR., Petitioner	)	
V.	)	CIVIL ACTION NO. 81-2499-C
WILLIAM CALLAHAN, Respondent	)	

MEMORANDUM

July 30, 1982

CAFFREY, Ch. J.

The petitioner, David Young, Jr., is an inmate at the Massachusetts Correctional Institute, Norfolk County located in Norfolk, Massachusetts. On February 15, 1979, he was convicted by a jury of two counts of second-degree murder and was sentenced to two consecutive life sentences. On November 3, 1980, the Appellate Division of the Suffolk County Superior Court Department

reduced the petitioner's sentence to two concurrent life sentences. On March 4, 1981, the Massachusetts Supreme Judicial Court, acting on direct appellate review, affirmed the two convictions. Commonwealth v. Young, 1981 Mass. Adv. Sh. 280. On September 30, 1981, the petitioner sought relief in this Court by means of an application for writ of habeas corpus. In his application, he presented three grounds which he claimed warranted habeas corpus relief. First, he alleged that his right to a fair trial and due process was abridged when the trial judge, over objection, ordered him confined to the prisoner's dock during the course of the trial. Second, he alleged that evidence of his prior bad acts not resulting in conviction was improperly admitted, thereby depriving him of a fair trial. Finally, he

alleged that an opinion offered by a ballistics expert was speculative and prejudicial and deprived him of a fair trial. The parties agree that the petitioner has exhausted his available state remedies, since each of the above issues was discussed by the Supreme Judicial Court in its opinion affirming the convictions.

The matter came before this Court on the respondent's motion to dismiss for failure to state a claim upon which habeas corpus relief may be granted. With respect to the petitioner's first claim, the respondent argues that this Court should not retrospectively apply the recent Supreme Judicial Court decision in Commonwealth v. Moore, 1979 Mass. Adv. Sh. 2334, holding that the use of prisoner's dock without specific findings of necessity violates a defendant's right to fair trial. See,

Commonwealth v. Guy, 1980 Mass. App. Ct. Adv. Sh. 419. The respondent also argues that the two other grounds alleged by the petitioner are merely evidentiary issues for which habeas corpus relief is not available. In opposition to the motion to dismiss, the respondent asserts that since the major issue during the trial was identification, placing the defendant in the prisoner's dock severely diluted his presumption of innocence and demands that this Court issue a writ of habeas corpus. Second, the petitioner argues that evidence of his participation in drug-related activities with the victims was so highly prejudicial as to result in a deprivation of due process.[1/]

1/ In his brief in opposition to the motion to dismiss, the petitioner did not address the allegation that the opinion of the expert ballistician was improperly admitted.

After hearing and a review of the lengthy record, I rule as follows.

Federal habeas corpus review of state criminal convictions does not lie for every legal error, but is limited to those errors which violate a petitioner's federal constitutional or statutory rights and which cannot be said to be harmless beyond a reasonable doubt. See e.g. Cupp v. Naughton, 414 U.S. 14, 146; Walker v. Butterworth, 457 F.Supp. 1233, 1236 (1st Cir. 1978). Each of the three claims raised by the petitioner in support of his application was directly addressed and rejected by the Supreme Judicial Court. As presented to this Court, I rule that none of the claims require or support a finding of constitutional error. See Cupp v. Naughton, supra at 146.

In particular, the petitioner has articulated no persuasive reason why the decision in Commonwealth v. Moore, supra should be retroactively applied when, in its opinion, the Supreme Judicial Court specifically stated that the decision should apply only in the future. Id. at 2340. Further, in upholding the petitioner's conviction, the Supreme Judicial Court refused once again to apply Moore restrospectively. Commonwealth v. Young, 1981 Mass. Adv. Sh. at 293-94. The Court rejected the petitioner's argument that, because his trial focused on the issue of identification, the case was factually distinguishable from Moore. Id. The Court in Young noted that, while the trial judge did not make specific findings of fact on the record, his clear instructions on the presumption of

innocence and on the proper methods for evaluating evidence alleviated any arguable prejudice to the defendant. Id. Ultimately, the Court ruled that not every circumstance which "focuses the jury's attention on the fact that defendants are the persons at trial can be considered to invade constitutional rights." Id., citing Commonwealth v. Campbell, 1979 Mass. Adv. Sh. 2055, 2077 n.14; see also Commonwealth v. Durant, 1979 Mass. App. Ct. Adv. Sh. 2085. With respect to the instant petition, I rule that there is no justification for not following the reasoned judgment of the Supreme Judicial Court.

Nevertheless, even if this Court were to consider de novo, whether the decision in Moore should be applied restrospectively, it should be noted that the petitioner has failed to

satisfy the three-part test set forth by the United States Supreme Court in Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967). First, the petitioner has not shown that, even if confinement in a prisoner's dock is a constitutional violation, such a violation substantially impairs the truth-finding function or raises serious questins about the accuracy of his guilty verdict. See Brown v. Louisiana, 447 U.S. 323, 328; Hankerson v. North Carolina, 432 U.S. 233, 243 (1977). Second, the prisoner's dock has been customarily used by some states for as long as a century. See Commonwealth v. Moore, 1979 Mass. Adv. Sh. at 2337. Finally, to allow retrospective application of the decision in Moore would have a dire impact upon the

administration of justice by raising the possibility that every single defendant who had been confined in a prisoner's dock during a criminal trial would now challenge his conviction.

The two remaining claims of the petitioner raise issues which are, at most, errors in evidentiary rulings and which do not rise to the level of a violation of due process. See Salemme v. Ristaino, 387 F.2d 81, 85 (1st Cir. 1978).

Consequently, I rule that the respondent's motion to dismiss should be allowed, that the petitioner's application for a writ of habeas corpus should be denied and that the petition should be dismissed.

Order accordingly.

APPENDIX C

COMMONWEALTH *vs.* DAVID YOUNG, JR.

Suffolk. October 6, 1980. — February 3, 1981.

Present: HENNESSEY, C.J., QUIRICO, KAPLAN, LIACOS, & ABRAMS, JJ.

Search and Seizure. Constitutional Law, Search and seizure. *Practice, Criminal*, Location of defendant in courtroom, Directed verdict. *Evidence*, Other offense, Relevancy and materiality.

Where police officers called after the discovery of the body of an apparent murder victim in the basement of a vacant house followed a trail of scrape marks from the basement to the rear of an adjacent house which also appeared abandoned and found a trail of blood leading from the front of the second house to an apartment on the third floor, the floors and walls of which were wet and bloodstained, the police were warranted by exigent circumstances in entering and moving through the second house and into and through the apartment, making observations and taking evidentiary materials in plain view, as well as taking photographs of the premises and performing certain tests on items therein. [ ]

Any error in admitting in evidence certain items taken in a warrantless search of an apartment, as well as photographs of the premises and analyses of specimens taken therein, was harmless where the evidence was merely cumulative of other proof. [ ]

At a criminal trial held prior to this court's decision in *Commonwealth v. Moore*, Mass. (1979), the defendant was not prejudiced by being obliged to sit in the prisoner's dock. [ ]

At a murder trial, there was no error in admitting evidence of drug dealing between the defendant and one of the victims where the evidence was relevant to establish a possible motive for the killings. [ ]

At a murder trial, there was no error in admitting in evidence a ballistician's testimony that a gun shown in the defendant's hand in a photograph taken prior to the killings appeared capable of firing the bullets that struck the victims. [ ]

At a murder trial, there was sufficient evidence to warrant denial of the defendant's motion for directed verdicts of acquittal. [ ]

INDICTMENTS found and returned in the Superior Court on March 18, 1977.

Pretrial motions to suppress evidence were heard by *Dwyer*, J., and *Brogna*, J., and the cases were tried before *Brogna*, J.

After review was sought in the Appeals Court the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Kimberly Homan (*Norman S. Zalkind* with her) for the defendant.

Jeremiah Sullivan, Assistant District Attorney, for the Commonwealth.

KAPLAN, J. Upon indictments for the murders of James ("D.J.") Walker and Lenwood Walker, brothers, in November, 1975, the defendant David Young, Jr., was tried by jury in February, 1979, found guilty of the crimes in the second degree, and sentenced to successive life terms.[1] We review the judgments of conviction which are challenged on several grounds: (1) that certain items secured by the Commonwealth in a search without warrant at the initial discovery of the crimes were erroneously admitted at trial; (2) that the defendant was improperly obliged to sit in prisoner's dock during trial; (3) that evidence of illicit drug dealing by the defendant should have been excluded; (4) that a ballistician's testimony about the photograph of a gun should have been excluded; (5) that motions for directed verdicts of acquittal should have been allowed. We affirm the judgments.

The evidence for the prosecution at trial was in outline as follows. On the morning of November 18, 1975, a body with fractured skull and several bullet wounds was dis-

[1] There was a prior trial of the defendant for the murders of the Walker brothers and assault and battery with a deadly weapon on one Anthony Grant. On the latter charge the defendant was convicted and the judgment was affirmed by the Appeals Court. *Commonwealth* v. *Young*, Mass. App. Ct. (1978) (Mass. App. Ct. Adv. Sh. [1978] 1174). The trial judge declared a mistrial on the murder charges after the jury failed to agree. A different judge presided over the present trial.

covered in the cellar of a vacant single-family house at 14 Jacob Street in the Mattapan neighborhood of Boston. The victim of what evidently had been a homicide was later identified as eighteen-year old D.J. Walker, and time of death was fixed by the medical examiner at between 10 A.M. and 10 P.M., November 17. Police upon investigation followed a trail of scrape marks from the basement of No. 14 to the rear of the adjacent three-decker house at 10 Jacob Street where it ended in blood and brain matter. Police also found a trail of blood leading from the front of No. 10 to an apartment on the third floor whose floors were wet and bloodstained. (The course of the police investigation and the scene in the apartment are dealt with further at point 1 below.) From the condition of the apartment it could be inferred that the victim had been assaulted there; and, taking into consideration the condition of the skull and body[2] and the trail first mentioned, it was inferable that the body had been dropped from the back porch of the apartment to the ground and moved or dragged to the cellar. The second trail was somewhat enigmatic. But on December 4, 1975, the bullet-pierced body of Lenwood Walker, seventeen years old, in partially decomposed state, wrapped in a distinctive purple sheet, was found in an open field which was being treated for rodents. Medical analysis (hindered by the condition of the body) tended to show that Lenwood had died on or about November 18. Analysis of the "testable" bullets, .38 caliber, in both bodies established that they had been fired from the same gun with a "6-left" rifling system.[3] The type B of the blood found in the apartment fit both Walker brothers. It was abundantly proved that the defendant occupied the apartment; he paid rent, albeit intermittently, to one George Legner who owned the

[2]The medical examiner indicated that abrasions on the buttocks and back of the victim were accounted for by dragging the body from the rear of No. 10 to the cellar of No. 14.

[3]Four of the six bullets recovered from D.J.'s body, and all four bullets recovered from Lenwood, were in adequate condition for ballistic testing.

building. (On occasion, apparently, the defendant could be found at an apartment on Morton Street or another on Browning Avenue.)

Further, the proof showed that the defendant knew the Walker brothers well, and that for some two years D.J. had sold marihuana supplied by the defendant. Millie Walker, the brothers' sister, testified that there had been friction between the defendant and D.J. in these illicit business dealings; on one occasion the defendant ceased using D.J. because, he said, "D.J. kept getting ripped off." Also the defendant believed the Walker brothers had participated in a robbery of the apartment at No. 10. Anthony Grant, who knew the defendant as well as the brothers, testified that in fact he and D.J. (but, he said, not Lenwood) had broken into the apartment and robbed it on November 7.

On November 14 Grant appeared at the defendant's mother's house at 102 Nightingale Street at the defendant's invitation. What started as a social evening soon turned ugly. The defendant led Grant to the basement ostensibly to look at some sex pictures. The defendant said he had "heard that you and Lenny, [and] D.J., broke into my house." Brandishing a club or small baseball bat, the defendant said, "I can't let you go. If I let you go, you will go and tell D.J. and Lenwood and they would leave town"; "I want, want to get them, you know." The defendant beat Grant with the bat and shot at him with a gun he was carrying, but missed.[4] Hearing the commotion the defendant's stepfather intervened. The defendant with a companion drove the injured Grant home, threatening en route to shoot him and drop him at Franklin Park. Arriving at Grant's mother's apartment, the defendant told one John Bowie, present there, "Tony and a couple of his friends had

[4]It was for this attack on Grant that the defendant was convicted at the prior trial (see note 1 above) and sentenced to five to ten years at Massachusetts Correctional Institution at Walpole.

Grant had seen the defendant with a .38 caliber large black gun and he thought that may have been the gun with which he was assaulted. He had also seen the defendant with a small silver gun.

broken into my house and I chastised him [Grant] a little bit"; "You better take care of him because I got something to do." The defendant also said (overheard by Grant's mother), "[K]eep Tony away from Mattapan and keep him away from the Walker brothers."

On November 15, Millie Walker saw the defendant in a hallway of her apartment house. He indicated he knew about her brothers' part in the robbery and asked where D.J. was. When Millie said she did not know, the defendant threatened her with a knife and said she should tell D.J. he was looking for him. That afternoon Millie and D.J. went to see the defendant. For a half hour or so there was a private conversation between D.J. and the defendant. The defendant, who was carrying a gun,[5] said in Millie's hearing that he could use some help in moving some of his things out of the apartment at No. 10 the coming Monday, November 17.

On November 17, the defendant telephoned the Walkers three times at their mother's house at 160 Westview Street, Dorchester. The mother answered the phone and recognized the defendant's voice. She said D.J. spoke with the defendant twice, at noon and 2 P.M., after which D.J. woke Lenwood, told him to shower, and said, "We have to go out later." About 3 P.M. the mother took the third call. The defendant said D.J. had agreed to help him move a couple of doors down from where he was living. D.J. got on the phone and then said to Lenwood, "Come on, man. Let's go help David move and get this man off my back." The brothers left. They did not return.

Sterling Garrison, an acquaintance of the defendant who boarded once or twice a week at the No. 10 apartment, testified that he dropped in at the defendant's mother's house around 2 or 3 P.M. on November 17. The defendant was there. He said "he had found out who had broken into his house [a]nd that they were supposed to be coming by the

[5] It was a silver gun with a brown handle. Millie Walker had also seen the defendant with a small black gun.

house, his house and later"; if Garrison "didn't want to get into any trouble" he "should leave" because "he [the defendant] was going to get them." The defendant was carrying a gun.

Despite the defendant's words, Garrison appeared at No. 10 about 10 P.M. (Earlier that evening he had looked for the defendant at the defendant's mother's house.) The door to the apartment was open and from the threshold he could see blood up and down the hall and a body on the living room floor. He did not recognize the body.[6] He entered and, avoiding the body, walked to the middle bedroom, grabbed the clothing he kept there and made a bundle of it with a purple sheet from the bed, and left with the bundle. There was testimony that the sheet in which Lenwood's corpse was wrapped was similar to the sheet used by Garrison.[7]

The police, after the investigation on November 18, promptly began a search for the defendant, but he had dropped from view and was not caught up with until a year later. He was then finally apprehended a floor above his mother's apartment crouched in a closet, wearing disguise.

For the defense, the defendant's mother was the principal witness; the defendant was not called. She said the defendant, except for a brief interval, was at her apartment all day through midnight of November 17, then she went to bed, and she had breakfast with him the next morning, November 18. But when questioned by the police on November 20, 1975, she said, according to police testimony, that she had last seen the defendant at 7 A.M. on November 17. The other defense witness, an assistant clerk of the Boston Municipal Court, produced a court record indicating that D.J.

[6] The body, according to Garrison, wore red shoes, and there was testimony by Mrs. Walker that D.J. was wearing shoes of that color the afternoon of November 17. The body in the cellar wore such shoes. Garrison was not acquainted with the Walker brothers.

[7] The police approached Garrison on November 19. A benzidine test performed on Garrison's shoes led the police to his cousin's place where he had left the bundle in the purple sheet.

might have appeared in court some time on November 17, which would put in question the mother's account of both brothers being at home when the telephone calls were received. On rebuttal the mother said D.J. had gone out early that morning, about 8:30, returned about 10:45, and had gone back to bed.

1. *Admission of evidence secured at initial investigation and search.* By motion and renewed motion the defendant sought on constitutional grounds to suppress items of evidence arising from the police investigation carried on without warrant at No. 10 on the morning of November 18. The trial judges on voir dire denied the motions over objection and entered findings.[8] The effective errors claimed are in the admission of certain of these items at trial.

(a) We outline the course of the investigation as elicited at voir dire. About 8:25 A.M., November 18, Officers Eugene J. Murphy and Daniel Duran were called to the cellar of No. 14. A gas company employee had discovered a dead body there. The officers asked for help, which arrived about 9 A.M. and later in some strength, including chemists, a fingerprint expert, and a photographer, for it could be assumed there had been a homicide and various kinds of evidence would have to be assembled and recorded. Attention was first centered on the cellar of No. 14. Around 9:30 or 9:45 A.M., Officer John McManus observed marks and stains near and on No. 10, which like No. 14 appeared abandoned. Barking sounds could be heard from within the building. Officers recruited from the cellar followed scrape marks and blood from the cellar at No. 14 to a termination point below the rear porches of No. 10. On another tack, officers, joined by an animal rescue attendant, found red stains on the sidewalk and entryway floor of No. 10. This trail took them, perhaps about 10 A.M.,

[8]The parties let stand the record made on the voir dire before the first trial, to which was added further evidence received on voir dire before the judge on first voir dire and added findings of his own.

through the open door of the house, up the stairs, past the entrances, with open doors, of unoccupied first and second floor apartments, to the third floor landing. The numerous stains on the way were dry, but the officers noted that an effort had been made to rub them out. Facing the third floor apartment, the officers saw a door off its hinges standing upright against the door jamb, partially blocking entrance. The barking dog was within, and the trail led there. Entering the apartment without hesitation, the officers pushed at the door, which fell inward. The attendant set a snare to catch the dog moving in the apartment. At this moment a man came forward from one of the rooms and took the dog in hand. The man, one John Diaz, was held in police custody.

Sergeant John Maillet, walking down the apartment hallway, looked into the kitchen, bathroom, pantry, and rear bedroom. The floors of the hallway and some of the rooms were wet, as if recently mopped.[9] In the pantry were a pail of water, a wet mop, and broom. The benzidine test, applied to the wet surfaces of the floors and to the pail and mop, proved blood (later analyzed as type B).

Maillet, on entering the rear bedroom, saw a bed, a bureau, and a closet with some clothing. An open wooden box on the floor contained a holster and some papers and pictures. Returning to the kitchen with the holster and some envelopes and pictures from the box, Maillet showed the pictures to Diaz. Diaz identified a man in the pictures, by name, as the defendant. (Diaz had explained his own presence in the apartment[10] and his clothes had been tested for

[9] It appeared from testimony at trial that the steam off a large tub of water simmering on a range in the kitchen may have prevented or postponed the drying of the floors. It is also suggested that it could make more difficult the recovery of fingerprints.

[10] Diaz said the defendant allowed him to board in the apartment for a small sum. On the morning of November 18, about 6 A.M., he entered the apartment through a porch window, as he had no key. He went to sleep without observing anything unusual. There was not mu[illegible] was under arrest. He was released that day.

blood with negative result.) While talking to Diaz, Maillet noticed red stains under the kitchen table and on a refrigerator, the latter in front of a rear door to the apartment. The door jamb was bloodstained. Maillet opened the door and walked down a short hallway leading to another door which opened to the back porch. Items in the hallway were bloodstained.

After Maillet's inspection, officers spent between one and two hours taking samples of the wet patches and of the floors and other solids, and also taking photographs of the interior of the apartment and the bloodstains in and near the building.

(b) The defendant moved "to suppress . . . all physical or testimonial evidence and any fruits thereof seized from 10 Jacob Street, Mattapan, on or about November 18, 1975." We take the judges by their findings to have held that an exigency existed which justified the police in entering and moving through the building and into and through the apartment, making observations and taking evidential materials within the sense of the rule of "plain view." And the judges believed that, within reason, the observations could be memorialized by photographs on the spot and tests could similarly be made. We agree with the judges in the principles they considered applicable.

Exigencies which may justify a procedure without warrant are a narrow category and must be established by the Commonwealth which bears the burden of proof.[11] But whether an exigency existed, and whether the response of the police was reasonable and therefore lawful, are matters to be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.[12] In the present case a brutal murder evidently

[11] See *Selectmen of Framingham* v. *Municipal Court of the City of Boston*, 373 Mass. 783, 785 (1977); *Commonwealth* v. *Saia*, 372 Mass. 53, 56 (1977); *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 57 (1974).

[12] See *Commonwealth* v. *Forde*, 367 Mass. 798, 802-803 (1975).

had been committed on an as yet unidentified person, and there were persuasive signs that the crime was linked to the seemingly abandoned building nearby. Perhaps foremost in the minds of the officers at the threshold of No. 10 was the possibility that there was some other person in that building, injured and requiring aid. Also in their minds would be the chance that a suspect was lurking there. The judges found that both motives or purposes were operative. As the Court said in *Mincey* v. *Arizona*, 437 U.S. 385, 392 (1978), "[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises."[13] See *Commonwealth* v. *LeBlanc*, 373 Mass. 478, 483-487 (1977); *Wayne* v. *United States*, 318 F.2d 205, 211-212 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); *State* v. *Johnson*, 413 A.2d 931, 933 (Me. 1980).

So the officers had the right — indeed a practical duty — to pass through the open door of No. 10 and, following the trail and heading toward the sounds of the barking dog, to mount the stairs, reach the apartment on the third floor,[14] and enter it. They encountered immediately the obvious site of a struggle or worse, and an individual who might be the very suspect. The right, after holding the individual, to go through the hallway and rooms of the apartment and make observations, was within the natural boundaries of the exigency. See *Commonwealth* v. *Bowden*, Mass. , (1980);[a] *Commonwealth* v. *Walker*, 370 Mass. 548, 556-558, cert. denied, 429 U.S. 943 (1976); *United States* v. *Barone*, 330 F.2d 543, 544-545 (2d Cir.), cert. denied, 377 U.S. 1004 (1964); *People* v. *Lovitz*, 39 Ill. App. 3d

[13] The *Mincey* case held excessive a four day intensive warrantless search under a purported "murder scene exception" created by the Arizona court.

[14] It may be noted that the defendant could have no "expectation of privacy," see *Rakas* v. *Illinois*, 439 U.S. 128, 142-148 (1978), in the yard outside or the inner stairway of No. 10. See *Commonwealth* v. *Hall*, 366 Mass. 790, 794-795 (1975).

[a] Mass. Adv. Sh. (1980) 75, 81.

624, 629-630 (1976), cert. denied, 434 U.S. 842 (1977); Mascolo, The Emergency Doctrine Exception to the Warrant Requirement under the Fourth Amendment, 22 Buffalo L. Rev. 419 (1972).

Their entry being lawful, here by reason of exigency, the police, in accordance with the rule of "plain view,"[15] could take into their possession material having apparent evidential connection to the criminal activity they were in course of investigating. The Court in *Mincey* v. *Arizona*, *supra*, went on to say (at 393), "And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." See *Commonwealth* v. *Meehan*, Mass. , (1979),[b] cert. dismissed, 445 U.S. 39 (1980); *Commonwealth* v. *Bond*, 375 Mass. 201, 206-210 (1978); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-466 (1971). Thus the officers could take bloodstained materials or other items in sight that seemed to be linked to the known homicide or to a possible further crime foreshadowed by the separate trail from the front of No. 10. With respect to materials taken from the open box, the import of the judge's findings is that surface observation of the nature of the collection would indicate that here might be evidence as to who lived in or controlled the apartment and therefore evidence, direct or mediate, as to the identity of a witness to or likely participant in the crime, or a victim of it. On a similar basis, envelopes, personal books of telephone numbers, notebooks, utility bills, and photographs, noticed in the course of otherwise lawful searches, have been held properly taken in "plain view," as in *Commonwealth* v. *Lee*, 2 Mass. App. Ct. 700, 702-703 (1974); *Commonwealth* v. *Fields*, 2 Mass. App. Ct. 679, 681-683 (1974); *United States* v. *Phillips*, 593 F.2d 553, 556-558 (4th Cir. 1978), cert. denied, 441 U.S. 947 (1979); *People* v. *Hill*, 12 Cal. 3d 731, 756-757 (1974); *Herrera* v. *State*, 561 S.W.2d 175, 177-179

[15] See our recent exposition in *Commonwealth* v. *Cefalo*, Mass. , - & n.9 (1980) (Mass. Adv. Sh. [1980] 1877, 1882-1890 & n.9).

[b] Mass. Adv. Sh. (1979) 710, 718.

(Tex. Ct. Crim. App. 1978) (en banc). Although the point perhaps need not be stressed here, once an item or collection is observed whose general character plausibly indicates evidential relevance, an officer may approach more closely (but short of a material additional intrusion) to note some details and on that basis to make a selective seizure. See *United States* v. *Sheard*, 473 F.2d 139, 144 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973); *United States* v. *Thweatt*, 433 F.2d 1226, 1230-1232 (D.C. Cir. 1970); *United States* v. *Catanzaro*, 282 F. Supp. 68, 69-70 (c.D.N.Y. 1968) (Weinfeld, J.); *State* v. *Streitz*, 258 N.W.2d 768, 773-774 (Minn. 1977). Contrast *United States* v. *Scios*, 590 F.2d 956 (D.C. Cir. 1978) (en banc); *United States* v. *Jackson*, 576 F.2d 749 (8th Cir.), cert. denied, 439 U.S. 858 (1978). See generally 2 W. LaFave, Search and Seizure § 6.7 at 482 (1978); 1 W. Ringel, Searches and Seizures, Arrests and Confessions § 6.5(a)(1) at 6-19 (1979). In the instant case we have no intrusion on closed drawers, or locked suitcases, or the like, and the findings deny specifically that there was any general exploratory search forbidden by the Constitution.

The judges considered the picture taking by the police as merely the recording of observations otherwise provable by testimony apt to be somewhat less accurate (see *Patrick* v. *State*, 227 A.2d 486, 488-490 [Del. 1967]; *State* v. *Epperson*, 571 S.W.2d 260, 265-266 [Mo. 1978] [en banc], cert. denied, 442 U.S. 909 [1979]; *State* v. *Johnson*, 413 A.2d 931, 933-934 [Me. 1980]), and the tests made on the premises, in some cases at least, as needing to be made on the spot, and in any event not unreasonably made there. See *United States* v. *Green*, 474 F.2d 1385, 1389-1390 (5th Cir.), cert. denied, 414 U.S. 829 (1973). See also *United States* v. *Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *United States* v. *Herndon*, 390 F. Supp. 1017, 1021-1022 (S.D. Fla. 1975), aff'd, 536 F.2d 1027 (5th Cir. 1976).

The defendant says that at some point after the apartment was entered it could have been secured, the police

operation suspended, and a warrant obtained to authorize further exploration. When the feasible point for such disengagement was putatively reached, is not made clear; as the findings indicate, some of the subjects of observation and test, such as the liquid on the floors, would not be available indefinitely. But anyway we think the suggested procedure would have served no particular purpose in the circumstances, and was not obligatory.[16] And that such a step might have been feasible, or even preferable in the long run, does not of itself condemn the reasonable procedure that was in fact followed. See *Commonwealth* v. *Forde*, 367 Mass. 798, 802-803 (1975).

(c) We add that error by the officers, if there was any, would amount merely to nominal error, harmless beyond a reasonable doubt. See *Commonwealth* v. *LaBriola*, 370 Mass. 366, 368 (1976); *Commonwealth* v. *Appleby*, 358 Mass. 407, 414 (1970). We look to the items of evidence in question which were actually received at trial, and consider how much turned on them. There were two pictures of the interior of the apartment, one of the kitchen refrigerator, the other of the rear hall and porch, both pictures showing bloodstains. Also admitted were two bloodstained pieces of flooring from the apartment, and other bloodstained specimens from the back porch, together with an analysis of these things and the results of other tests made in the apartment. If all this evidence were held inadmissible on the theory, e.g., that a warrant should have preceded picture taking, collection of specimens, and testing, the oral testimony by witnesses about the physical conditions would remain, and also the results of the tests for blood carried out on stains at places outside the third floor apartment, including the sidewalk and stairs of No. 10.

The situation with respect to the material taken from the open box is just as clear. Admitted in evidence were seven

[16] The officers' stay in the apartment was continuous and not excessive. It compares favorably with the night and morning stays for investigative purposes in a fire gutted building which were held reasonable in *Michigan* v. *Tyler*, 436 U.S. 499, 510-511 (1978).

envelopes and two phone bills addressed to the defendant (at locations other than No. 10), the holster, a photograph of the defendant and his nephew both holding guns, and a half dozen other pictures, one showing D.J. with a gun, one showing the defendant with a gun, one of the defendant holding an object that may be a cigarette lighter, two showing the defendant and companions, and one of the defendant alone. All these tended in some measure to prove that the defendant lived at the apartment, but that was established through the witnesses Grant, Garrison, Diaz, and Legner, as indicated above, to whom may be added Millie Walker and the defendant's mother. Some of the items — pictures and holster — tended to prove that the defendant had access to a variety of guns, but that was proved through the witnesses Grant, Millie Walker, and Garrison, as noted above, and we may add the defendant's mother. The picture showing D.J. tended to prove that the defendant and D.J. were acquainted, but that was well agreed. Thus the items in question were merely cumulative upon other proof. (The picture of the defendant and nephew is dealt with again at point 4 below.)

2. *Defendant in the dock.* At trial the defendant was denied a motion to be seated with his counsel and was relegated to the dock. This, he claims, impaired the presumption of his innocence. But at the date of trial we had not modified our rejection of such a contention and had left seating arrangements to the trial judge. See *Commonwealth* v. *Walker*, 370 Mass. 548, 573-574, cert. denied, 429 U.S. 943 (1976); *Commonwealth* v. *MacDonald (No. 2)*, 368 Mass. 403, 408-409 (1975).

It is true that in *Commonwealth* v. *Moore*, Mass. , , - (1979),[c] considering approvingly *Walker* v. *Butterworth*, 599 F.2d 1074, 1080-1081 (1st Cir.), cert. denied, 444 U.S. 937 (1979) (rev'g on other grounds, 457 F. Supp. 1233 [D. Mass. 1978]), we held that a defendant's request to sit with his counsel should be allowed unless valid reasons of security, spread on the record, otherwise required. However, this rule was to apply "[f]or the future."

[c] Mass. Adv. Sh. (1979) 2334, 2338-2340.

Mass. at .[d] The present case is not covered. See *Commonwealth* v. *Guy*, Mass. App. Ct. (1980).[e]

The defendant argues nevertheless that there was error, first, because the *Butterworth* case had been decided at the District Court level when the present case was tried, and its reasoning (457 F. Supp. at 1238-1239) was urged upon the trial judge; second, because the refusal to follow the District Court's reasoning was particularly damaging, as only the identity of the murderer, not the fact of the murders, was open to any doubt, and on that question appearances might have had an important influence. We acknowledge that the trial judge might have done better to set out his appraisal of the circumstances of the case before him, which included an affidavit of counsel about the defendant's record of past behavior. But his failure to do so does not suggest a reversal of the conviction. The District Court opinion in *Butterworth* states that "petitioner's discretionary segregation in the dock neither diluted his presumption of innocence nor denied him a fair and impartial trial" (at 1239). And in *Moore*, while we recognized that the casual use of the dock was unwise, this was not because the practice always or even usually operated to the defendant's prejudice, but rather because there was no good reason in appropriate cases to risk even a very remote possibility of hurting a defendant's chances. In *Moore* itself no prejudice was shown to justify reversal. In the instant case the judge gave clear instructions on the presumption of innocence and the manner of approaching the evidence in the case. The dock was not mentioned, but the defendant had not requested an instruction on the subject. "[N]ot every incident or circumstance which focuses the jury's attention on the fact that the defendants are the persons on trial can be considered to invade constitutional rights." *Commonwealth* v. *Campbell*, Mass. , n.14 (1979).[f]

3. *Admission of evidence of drug dealing.* Relevant evidence is not rendered inadmissible merely because it indi-

[d] Mass. Adv. Sh. (1979) at 2340.

[e] Mass. App. Ct. Adv. Sh. (1980) 419.

[f] Mass. Adv. Sh. (1979) 2055, 2077 n.14.

cates that the defendant may have committed an offense other than that for which he is being tried. See *Commonwealth* v. *Monsen*, Mass. , (1979);[8] *Commonwealth* v. *Hoffer*, 375 Mass. 369, 372 (1978). Yet there is ground for excluding such evidence if the prejudice likely to be generated by it outweighs its probative value — a matter on which the opinion of the trial judge will be accepted on review except for palpable error. See *Commonwealth* v. *Chalifoux*, 362 Mass. 811, 815-816 (1973).

There was objection to testimony by Anthony Grant and Millie Walker about drug dealing between the defendant and D.J., more specifically about D.J. being "ripped off," which could lead the defendant to believe that D.J. was shortchanging him in accounting for sales of drugs. The testimony was relevant as supplying a possible motive for the defendant's taking violent action against D.J., and the relevance is not diminished because there may have been another and perhaps more potent motive deriving from the break-in at the apartment. We cannot say that the judge erred in admitting the testimony. It was well for the jury to have a view of the entire relationship between the defendant and one of the alleged victims. The drug trafficking was not dwelt upon in undue detail calculated to put pressure on the jury, and the judge's instructions advised the jury to adopt a dispassionate attitude toward the proofs.

4. *Admission of ballistician's testimony.* Officer William J. Murphy, a ballistician of the Boston police department, testified for the prosecution that the testable bullets that struck the victims were all .38 caliber and fired from the same weapon having a "6-left" rifling system. (He testified also that the .38 caliber bullets fired past Anthony Grant, and recovered in the cellar of the defendant's mother's house, did not come from that weapon.) Murphy was shown the photograph from the open box in the third floor apartment which showed the defendant and his four- or five-year old nephew each holding a gun. Murphy said the gun in the defendant's hand was probably a Colt whose ap-

[8] Mass. Adv. Sh. (1979) 309, 318.

pearance was "consistent with" that of a gun that could have fired the bullets that struck the victims. Because there were a multitude of guns in existence, of various makes and characteristics, that looked like the photographed gun, some of which could, and others of which could not have delivered those bullets, Murphy's testimony on this point was only marginally probative, as a voir dire had indicated, and the judge might have been better advised to exclude it. However, an able cross-examination demonstrated the weakness of the testimony, and we think the defendant was, if anything, helped rather than prejudiced by it. By the same token, if there was error in failing to suppress this photograph, the error was harmless.

5. *Denial of directed verdicts of acquittal.* Applying the standard of *Commonwealth* v. *Latimore*, Mass. , - (1979),[h] to the application herein for directed verdicts of acquittal, we judge the denial to have been correct. Motive and intention were shown, as well as the likely availability of means. Then we have the victims invited to the fatal place and physical evidence pointing to the fact and manner of the assault on them there. A quantum of proof is added by the defendant's submergence or disappearance for a year to avoid capture. As we have said recently, "That the case against [the defendant] was 'circumstantial' in some sense of that dubious term does not suggest that the proof was insufficient. . . . A web of convincing proof can be made up of inferences that are probable, not necessary." *Commonwealth* v. *Best*, Mass. , (1980).[i]

Upon a review of the record pursuant to G. L. c. 278, § 33E (see *Commonwealth* v. *Davis*, Mass. , [1980][j]), we find no basis for mitigation of the verdicts or for a new trial.

Judgments affirmed.

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[h] Mass. Adv. Sh. (1979) 2043, 2049-2052.

[i] Mass. Adv. Sh. (1980) 2039, 2049.

[j] Mass. Adv. Sh. (1980) 555, 570.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIM. NUMBERS
07485-86

COMMONWEALTH)
)
V.)
)
DAVID YOUNG, JR.)

MOTION TO ALLOW THE DEFENDANT TO SIT AT COUNSEL TABLE RATHER THAN IN THE PRISONER'S DOCK

Now comes the defendant in the above-captioned cases and hereby moves this Honorable Court to allow him to sit at counsel table rather than in the prisoner's dock.

As grounds for this motion, defendant says that forcing him to sit in the prisoner's dock would deprive him of his constitutional rights to a fair trial, to the presumption of innocence,

to access to counsel, non-suggestive eyewitness identifications, and due process of law.

Respectfully submitted,

By his attorney,

Norman S. Zalkind

ZALKIND & ZALKIND
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020

January 2, 1979

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIM. NUMBERS
07485-86

COMMONWEALTH)
)
V.)
)
DAVID YOUNG, JR.)

AFFIDAVIT OF NORMAN S. ZALKIND
IN SUPPORT OF MOTION TO ALLOW
THE DEFENDANT TO SIT AT
COUNSEL TABLE RATHER THAN
IN PRISONER'S DOCK

I, Norman S. Zalkind, hereby depose and say:

1. I am the attorney for the defendant in the above-captioned cases.

2. The defendant has been in custody since November 1976. I have been informed by correctional officers on many occasions that the defendant has been in all respects a model prisoner.

3. In his more than two years of incarceration, the defendant has not been involved in any incidents involving violence or the threat of violence, nor has he been involved in any incidents of any nature involving infractions of institutional disciplinary regulations.

4. The defendant did not attempt to escape from custody on the day of his arrest and has not done so since that time.

5. The defendant is small in stature.

6. The defendant has substantial reasons to participate fully and cooperatively in the defense of his case. He has a strong case on the facts, as evidenced by the fact that the first trial of these indictments ended in a mistrial when the jury were unable to agree upon a verdict. He has

consistently refused offers to plead guilty to manslaughter.

7. The first trial of this case involved more than a week of testimony, a substantial portion of which concerned acts and conduct of the defendant over a period of several days presented by a number of witnesses, which did and will again require consultation with the defendant.

8. I have represented David Young, Jr. since March, 1977. From my dealings with him during that time, from my observations of him, and from discussion with others who have known him during that period, including correctional officers, I believe that allowing David Young to sit at counsel table will not present any hazards to the orderly judicial process or to the security of its personnel.

9. I believe that forcing the defendant to sit in the prisoner's dock would deprive him of his constitutional rights to a fair trial, to the presumption of innocence, to access to counsel, non-suggestive eyewitness identification, and due process of law.

SIGNED AND SWORN TO THIS 2nd DAY OF JANUARY, 1979 UNDER THE PAIND AND PENALTIES OF PERJURY.

_____

Norman S. Zalkind

January 2, 1979

APPENDIX F

TRANSCRIPT: Commonwealth v. Young, Suffolk Nos. 07485-86 February 1, 1979, pages 50-51.

MR. ZALKIND: I have a motion, your Honor, for the defendant to sit at counsel table. It's a recent one. I had one before and I have a recent one.

THE COURT: That is all right. That is denied.

MR. ZALKIND: Denied you said, your Honor?

THE COURT: Yes.

MR. ZALKIND: May I be heard?

THE COURT: Look. We do it routinely. At some time the Supreme Court may tell us different. I know the arguments, pros and cons, having heard them. Until the Supreme Court tells me no we are going to follow ---

MR. ZALKIND: I take my exception.

EXCEPTION NO. 2

And I also just mention for the record so I will be protected later on because I have gotten an extremely favorable opinion on this from Justice Caffrey on the Walker case, and I just wanted to make it clear on the record that I consider this a Constitutional question.

THE COURT: All right.

MR. ZALKIND: And I take my exception to that.